Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25 of the	)	
Cable Television Consumer Protection and	)	MM Docket No. 93-25
Competition Act of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA AND THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISERS IN THE NOTICE OF PROPOSED RULEMAKING

The Alliance for Community Media and the National Association of Telecommunications Officers and Advisors ("Alliance/NATOA") respectfully submits comments in response to the Notice of Proposed Rulemaking, FCC 95-484, in the above-captioned proceeding, released January 21, 1997 ("Notice").

I. INTEREST OF PARTIES

The Alliance for Community Media is a national membership organization comprised of more than thirteen hundred organizations and individuals in more than seven hundred communities. Members include access producers, access center managers and staff members, local cable advisory board members, city cable officials, cable company staff working in community programming, and others involved in public, educational and governmental ("PEG") access programming around the country. The Alliance assists in all aspects of community programming, from production and operations to regulatory oversight.

These centers produce and transmit local non-commercial, non-profit educational and public affairs television programming on local cable systems, pursuant to local franchise agreements authorized

by Section 611 of the 1984 Cable Act.[1] As such, the Alliance represents the interests of religious, community, educational, charitable, and other non-commercial, non-profit institutions who utilize PEG access centers and facilities to speak to their memberships and their larger communities and participate in an ever-growing "electronic town hall." The organization represents the interests of the hundreds of thousands of employees and volunteers who help produce educational, governmental and public access programming. Finally, it represents the concerns of everyone who believes that the tremendous resources of the Information Age should be made available to "at-risk" communities that otherwise would have insufficient means.

In many smaller and rural towns and villages, PEG access is the only means by which residents receive truly local programming. In suburban jurisdictions which may be served by one or more broadcast stations, PEG access programming allows cable subscribers to participate in events and activities of importance to the suburban community, from local school board meetings and town council elections to televised plays and concerts. PEG access also provides a forum for local religious and educational programming, community college courses, and high school football games. In large urban areas, PEG access provides a variety and diversity of communication which is unavailable on commercial local stations.

PEG access is provided on cable systems pursuant to a franchise agreement between a cable operator and a franchising authority (typically, a municipal government).[2] Cable operators may also be required to provide services, facilities and equipment to make such access possible.[3] Franchise authorities, which are entitled to collect franchise fees of up to five percent of gross revenue from cable

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[1]Cable Communications Policy Act of 1984, Sec. 611 (47 U.S.C. Sec. 531).

[2]Id.

[3]Id.

operators,[4] will often provide a portion of these fees for PEG access. PEG centers throughout the nation produce more than 20,000 hours of original programming per week; this is more than CBS, NBC, ABC, and PBS combined.[5]

The National Association of Telecommunications Officers and Advisors ("NATOA") is the principal nonprofit organization in the country devoted solely to serving and assisting local governments and regional authorities on cable and telecommunications matters. NATOA is made up of individuals and organizations responsible for telecommunications policies and services in local governments and regional authorities. Many NATOA members manage or regulate PEG access centers.

II. INTRODUCTION

In enacting the Cable Television Consumer Protection Act of 1992 ("1992 Act")[6], Congress intended that DBS services carry a diversity of programming and information which would serve the public interest.[7] Section 25 of the 1992 Act (codified at 47 U.S.C. § 335) was enacted to achieve that end. This section instructs the Federal Communications Commission ("Commission") to require that DBS providers serve the public interest, reflect localism, and set aside channel capacity for "non-commercial programming of an educational or informational nature."[8]

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[4]1984 Cable Act, Sec. 622 (47 U.S.C. Sec. 542)

[5]S.Rep. 103-367 (accompanying S. 1822), 103rd Cong., 2d. Sess. (1994) at 15.

[6]Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460("1992 Act").

[7] 1992 Act § 2(b)(1), 106 Stat. at 1463; see also Time-Warner Entertainment Company, L.P. v. FCC, 93 F.3d 957, 976 (D.C. Cir. 1996) ("Time Warner").

[8] 47 U.S.C. §335(b)(1).

A. SECTION 335 MIRRORS ACCESS REQUIREMENTS ON CABLE SYSTEMS

1. The Provision Resembles the PEG Access Provision of the 1984 Cable Act, and Should be Implemented in the Same Manner.

Section 335 and the PEG access provisions of the 1984 Cable Act were both created to increase public discourse and provide for a diverse range of non-commercial voices. Section 335 of the Act states categorically that "[t]he provider of direct broadcast satellite service shall not exercise any editorial control over any video programming provided pursuant to this subsection."[9] By implication, this prohibition requires the Commission to assign editorial control and/or administration of the non-commercial capacity to an independent entity, such as a government agency or non-profit organization that is not the direct broadcast satellite service provider, its subsidiary, or an entity which is otherwise affiliated through ownership or contract with such DBS provider.

The parallel structure of §335(b)(3) and §531(e) of Title 47 suggest that an independent non-profit organization or governmental agency is the most appropriate entity to manage the non-commercial capacity.[10] Alliance/NATOA believes that failure explicitly to put editorial control in the hands of an independent entity will make the statute effectively inoperative. This is primarily because there is a danger that DBS providers will attempt to exercise editorial control over programming in violation of subsection 335(b)(3). Moreover, the provision of the law which allows the providers to take back unused capacity would give a DBS -controlled management entity a strong incentive to see that the non-commercial capacity remains unused and unprogrammed.

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[9] Id. § 335(b)(3).

[10] See, e.g. Comments of Association of America's Public Television Stations and Corporation for Public Broadcasting ("AAPTS/CPB Comments") (May 24, 1993) at 24.

The Commission should take note of cable's experience with leased access. Cable leased-access has failed in general to provide meaningful access opportunities for non-affiliated cable programmers,[11] notwithstanding the fact that leased access is statutorily mandated.[12] We urge the Commission not to use the model of leased access for non-commercial access DBS systems. Assignment of programming and administration functions to an independent entity would promote the spirit of the provision; assignment to DBS providers would prevent the statute from operating effectively.

2. Satellite Transmission Technology Serving Local Markets Should Be Utilized On Commercial And Non-Commercial Channels Alike To "Promote Localism".

As satellite technology improves, DBS providers will increasingly be able to provide local programming on CONUS satellites. We urge the Commission to require that some "spot beam" transponder capacity be allocated for local and regional non-commercial educational and informational programming. Programming by local colleges, programs on regional history, musical and theatrical performances, and other cultural and public affairs offerings would be appropriate uses of this non-commercial capacity. As the attached affidavits demonstrate, there has been significant programming production in this field already. Distribution on DBS "spot beam" capacity would give this programming significant new audiences.[13]

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[11] See Leased Access, Second Report and Order and Second Order on Reconsideration, CS Dk. 96-60, FCC 97-27, released January 31, 1997("Leased Access Second Order") (leased access not sufficiently utilized).
[12] 47 U.S.C. § 532.
[13] See Comments of the National Association of Telecommunications Officers and Advisors ("NATOA Comments") (May 24, 1993) at 8.

B. "RED LION" REQUIRES BROADCAST ENTITIES TO PROMOTE DIVERSITY.

Red Lion Broadcasting v. FCC[14] still provides the most eloquent statement of how the First Amendment applies to telecommunications policy:

> It is the right of viewers and listeners, not the right of the broadcasters, which is paramount [citations omitted]. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee [citations omitted]. "Speech concerning public affairs is more than self-expression; it is the essence of self-government." [citations omitted]. It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.[15]

In addition to Red Lion, the Commission should give considerable deference to the D.C. Circuit's panel opinion in Time-Warner. Significantly, the panel cites Red Lion for the proposition that spectrum scarcity continues to be an issue on DBS systems.[16] The Court recognized that nonprofit noncommercial programming would always be at a comparative disadvantage to commercial programming.[17] The panel reasoned that, under these circumstances, a countervailing interest in diversity was not only cognizable, but "a governmental purpose of the highest order."[18] Stated the court,

> The government asserts an interest in assuring public access to diverse sources of information by requiring DBS operators to reserve four to seven percent of their channel capacity for noncommercial educational and informational programming. Indeed, a stated policy of the 1992 Act is to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media." 1992 Act, §2(b)(1), 106 Stat. at 1463." ... Section 25 [47 U.S.C. § 335] ... represents nothing more than a new application of a well-settled government policy of ensuring public access to noncommercial programming ... The set-aside requirement is hardly onerous, especially in light of the instruction, in the Senate Report, that the FCC "consider the total channel capacity of DBS systems operators" ... its purpose and effect is to promote speech, not to restrict it.[19]

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[14] 395 U.S. 367 (1968).
[15] Id., 395 U.S. at 390.
[16] Time-Warner, 93 F.3d at 975.
[17] Id. at 976.
[18] Id. at 957, citing Turner Broadcasting Systems, Inc., v. FCC, 114 S.Ct. 2349 at 2470 (1994)("Turner I").
[19] Ibid.

Alliance/NATOA believes that the D.C. Circuit has, in effect, asked the Commission should implement Section 335 in such a way as to give substantive meaning to the court's view that a diversity of voices on DBS is a government interest of the highest order.

This view of the importance of regulating mass media in order to promote diversity was most recently underscored by the Supreme Court in Turner Broadcasting System, Inc. v. FCC, ___ U.S. ___, 117 S.Ct. 1174 (1997) ("Turner II"):

> We have noted that "it has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" Turner, 512 U.S. at 663-664 (quoting United States v. Midwest Video Corp., 406 U.S. 649, 668 n.27 (1972)(plurality opinion)(quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)); see also FCC v. WNCN Listeners Guild, 450 U.S. 582, 594 (1981). "'Increasing the numbers of outlets for community self-expression'" represents a "'long-established regulatory goal in the field of television broadcasting.'" United States v. Midwest Video Corp., supra, at 667-668 (plurality opinion).

Turner II, 117 S.Ct. 1174 at 1187-88. The Supreme Court and Congress are in agreement that diversity of voices is a worthwhile goal of broadcasting policy. The Commission's rules should, insofar as possible, give life to this policy objective, and implement it in a way that produces clear and measurable results.

III. THE RESERVATION OF CAPACITY SHOULD BE DETERMINED BY REFERENCE TO TOTAL BANDWIDTH USED FOR ANY PURPOSES, OR THE NUMBER OF SEPARABLE TRANSMISSIONS THAT CAN BE PROVIDED SIMULTANEOUSLY.

In defining a channel for the purposes of Section § 335, The Alliance/NATOA. believes that advances in compression technology over the past four years makes a single transponder an inappropriate measure for the purpose of determining the amount of channels that must be reserved. We agree with those commenters in the 1993 proceeding who recommended that a channel should be defined

one of two ways. One methodology is to describe the channel as "bandwidth sufficient to carry a signal that, after decompression and decoding, is equivalent to one NTSC video/audio transmission (including all associated non-video and supplementary transmissions)."[20] In the alternative, the Commission could define the set aside as "four to seven percent of all usable transponder bandwidth which can be utilized by the licensee."

This measurement may ensure that the capacity of the set-aside is extended to bandwidth that is not only currently in use, but which may come into use at some later date. This methodology also obviates the need to recalculate and reset the system every time a DBS provider decides to utilize more transponder capacity.

To effectuate this proposal, the non-commercial programming must be delivered using the same encoding and encryption technology as commercial DBS programming. Under no circumstances should a DBS provider be permitted to segregate non-commercial from commercial capacity in such a way that consumers will be required to purchase additional equipment. Ideally, non-commercial channels should be interspersed throughout the provider's programming lineup.

When this proceeding commenced four years ago, the non-commercial set aside was being considered in the context of a technology which was in its infancy. Now, in 1997, DBS has over 4 million subscribers, and is projected to have 21 million within the next five years.[21] It has emerged as a strong competitor to cable television, with each provider currently offering approximately one hundred channels; all have discussed their imminent plans to expand further by utilizing compression technology. The Murdoch-Echostar combination has promised a service that will be able to deliver approximately 500 channels simultaneously.[22] In this environment, it does not significantly impinge on these entities'

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[20] See, e.g., Comments of Consumer Federation of America ("CFA Comments")(May 24, 1993) at 7.
[21] Lee Hall, "Sky Vows Air War On Cable," Electronic Media, March 3, 1997, 1 at 38.
[22] See, e.g. Mark Robicheaux, "News Corporation to Buy 50 Percent Stake in Echostar in $1 Billion Deal," Wall Street Journal, Feb. 25, 1997 at A1; Mark Landler, "Deal by Murdoch for Satellite TV Startles Industry," New York Times, Feb. 26, 1997 at D1; Mark Landler, "Cable Industry Sees Minimal Threat in Murdoch's 'Sky' Service," New York Times, March 20, 1997 at D1.

proprietary rights over the remaining 93-96 percent of their systems to require that a small amount of this capacity be reserved for non-commercial public service and public affairs uses. At this point, the likelihood of harm to DBS' commercial viability by requiring that the industry set aside the full seven percent of its capacity creates minimal danger to the financial health of the DBS industry. Unlike cable, no programming will have to be removed to provide transponder capacity for this non-commercial programming; all of the satellite licensees have capacity to spare. We endorse the sliding scale methodology created by the CFA in its comments,[23] and cross endorse the sliding scale proposed by Denver Area Educational Telecommunications Consortium Inc., et al. in this proceeding.

IV. DBS LICENSEES SHOULD BE RESPONSIBLE FOR ENSURING THAT RESERVATION REQUIREMENTS ARE MET.

Alliance/NATOA. supports those commenters who in 1993 suggested that the licensee be held ultimately responsible for implementing the Commission's regulation in this proceeding.[24] The licensee has ultimate control over the use of its system, also has the power to require lessees that lease significant amounts of transponder capacity to reserve some of their leased capacity as one of the terms of the contract. Insofar as a DBS system may carry two or more independent programming services, we would recommend that each program packager be required to set aside capacity in accordance with the sliding scale. However, as mentioned above, this contingency is not likely to be necessary. We are not aware of any DBS provider that is currently leasing carrying capacity to a third party. This further supports the recommendation that the licensee be responsible for carrying out the provisions of §335(b).

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[23] CFA Comments at Appendix A.
[24] Id. at 2-5; see also AAPTS/CPB Comments at 5-12.

V. "NON-COMMERCIAL PROGRAMMING OF AN EDUCATIONAL OR INFORMATIONAL NATURE" SHOULD BE BROADLY DEFINED TO INCLUDE ARTS, PUBLIC SERVICE AND GOVERNMENTAL PROGRAMMING.

Alliance/NATOA believes that § 335(b) offers DBS subscribers a tremendous opportunity to see varieties of programming that encompass the range of human experience, but which generally are not seen because they lack commercial viability. Such programming includes not only distance-learning and public affairs programming, but also the performing arts, regional affairs, programming by and about minority and at-risk populations (programming by and about ethnic groups, religious organizations, women, the disabled, social services agencies, etc.)[25]

PEG access provides an appropriate model of the types of programming we believe should all be subsumed within "educational and informational programming." We ask the Commission to take note of the rich diversity of programming possibilities that PEG access centers offer for educational and informational purposes. It is this type of diversity that is at the core of the First Amendment , and a goal that the Supreme Court has repeatedly endorsed.

VI. NON-COMMERCIAL CHANNELS SHOULD BE ADMINISTERED AND OPERATED BY A NON-PROFIT ENTITY INDEPENDENT FROM DBS OPERATORS.

A. THE STATUTE PROHIBITS DBS OPERATORS FROM EXERCISING EDITORIAL CONTROL; IT MUST BE ASSIGNED TO AN INDEPENDENT ENTITY.

As noted above, §335(b)(3) explicitly prohibits DBS providers from exercising editorial control over the channel capacity reserved for non-commercial uses. Experience with cable leased access and

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[25] See, e.g., Comments of Hispanic Information Telecommunications Network, Inc. (May 24, 1993) at 4-6; NATOA Comments at 13-15.

cable operator-managed public access channels show that the operator should not be made responsible for permitting third parties to have access to the system without exercising editorial control. In all but a handful of circumstances, the actual ability of third-parties to utilize their right has been non-existent.[26] In both cases, the system operator has an enormous incentive to sabotage third-party access, whether by pricing third parties out of the market, failing to notify potential customers that such a service is available, or by failing to engage in good faith negotiations with third-party programmers.

The statute's effectiveness is not to be measured by the extent to which it improves the marketability of the DBS provider. Consequently, there is no reason why the DBS industry should have any input into the content of the channels. If the Commission truly wants this non-commercial spectrum to be utilized effectively, it must designate an entity that is completely independent of the industry to administer and/or program the capacity.

B. THE "PEG" MODEL IS A SUCCESSFUL EXAMPLE OF HOW INDEPENDENT ENTITY CAN OPERATE USING DBS CAPACITY.

The Alliance/NATOA joins with commenters in the previous cycle of this rulemaking who endorse a model similar to that utilized by public access centers around the country as an administrative entity.[27] The Commission should seek an independent non-profit organization with a Board of Directors representing diverse constituencies and bringing a range of talents to the organization to administer this capacity. This entity will be able to develop programming policies and exercise its administrative authority in a way that will fulfill congressional intent to provide informational and educational programming.

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[26]See in general Leased Access Second Report.
[27]See, e.g., NATOA Comments at 10.

1. **The Organization Must Have Complete Editorial Independence From DBS Providers.**

No more than ten percent of the administrative entity's Board of Directors should have any financial interest in the telecommunications industry. We believe that the ideal board of directors for such an organization would be comprised of educators, government officials, and people notable in fields related to informational and educational programming (such as broadcast journalists, academics, former network programming executives, business and religious leaders). The expertise of an industry representative is needed on the board in order for the programming to coordinate with the technical standards and advances in DBS technology. Otherwise, industry representation in programming this reservation of capacity should be minimal to non-existent.

2. **Funding To Come From DBS Operators, Federal Government, And Programmers.**

Section § 335(b) does not identify any funding source for the independent administrative authority it has implicitly created in the 1992 Act. This means that, in order to fulfill Congressional intent, the Commission must find a way to allow such an entity to come into existence without a specific allocation of federal funds.

The Alliance/NATOA joins with those entities that in the first round of comments suggested that DBS providers be required to allocate a small fraction of their gross revenues (no greater than 5 percent) to the establishment and maintenance of non-commercial channels and the authority that supervises the programming of those channels.[28] Such an allocation would include all the equipment, facilities and

[28] Id.

services that would be required by the administrative entity in order to transmit programming to the non-commercial transponders of each satellite system.[29]

In the alternative, the Commission should consider authorizing the administrative entity to charge administration fees to programmers in order to cover administration costs, equipment and fees for use of the transponders, if any. The non-profit entity should also be able to seek and accept funding from public and private grantors, such as the United States Department of Education, the National Endowment for the Arts, the National Endowment for the Humanities, and private educational foundations.

3. Program Selection Should Include Distance-Learning/Classroom Programs From A Variety Of Sources, To Be Simulcast From All DBS Providers.

The DBS reservation provides a real opportunity for our country to create a nationwide distance-learning program serving all educational institutions, from kindergarten to university graduate study. If the Internet is a vast electronic library, DBS distance-learning service provides classroom instruction.

Many Alliance members provide distance learning programs on cable systems as a way of supplementing secondary and university education programs -- and these have been effective in improving the skills and knowledge cable subscribers in franchises where those programs exist. The Alliance/NATOA. believes that a significant amount of channel time should be given over to such programming, preferably during daytime school hours so that schools and universities subscribing to DBS can utilize these programs as they are transmitted.

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[29] Id. at 5.

4. **A Percentage Of Programming Should Be Offered On A First-Come, First Serve Basis.**

Like PEG access, the non-commercial DBS reservation offers national opportunities for involvement and democratic discourse. Consequently, the Alliance/NATOA believes that a certain amount of programming time on DBS should be allocated in a manner similar to public access channels -- on a first-come, first-serve non-discriminatory basis. In certain circumstances, it may be appropriate to localize distribution to the programming's origination point.

In the alternative, the Commission may want to empower the Board of the programming entity to designate a block of time for non-series programming (such as theater or orchestral performances, readings, and non-profit special interest programming) over which the entity would have editorial control. The programming entity would be instructed to select such programming for its cultural, educational or informational value, or its contribution to political and social discourse on important topics touching on public affairs.

The Commission should also consider imposing reasonable ceilings on the volume of use of these non-commercial channels by any individual programmer. Some of these principles would include: a ceiling on programming time, not to exceed 10 percent of total program hours. Assigned programming "slots" should not be longer than one year's duration, regardless of the entity maintaining control over that slot. The exception to this rule might be programming produced or distributed by PBS, which may be allocated up to six hours per day of programming time. In addition, some programming should be transmitted on a local or regional basis. As discussed above, such spot-beam transmission is not only possible, but seems likely to be used for a substantial number of local commercial broadcast stations. The Alliance/NATOA believes that the same courtesy should be extended to local noncommercial

programming entities, like PEG access centers, so that people various regions may view at least some noncommercial programming that addresses local concerns.

VIII. RATES AND CHARGES MUST BE REASONABLE; A REASONABLE RATE IS ONE THAT IS LOW ENOUGH TO ENSURE THAT ALL AVAILABLE CAPACITY IS UTILIZED.

The Commission should exercise its authority under Section 335(b)(4)(B) to require DBS providers to provide reserve transmission capacity free of charge, regardless of whether the Commission opts to require DBS providers to also provide equipment facilities and services.[30]

However, we recognize that there will be pressure on the Commission to permit pass-through of high direct costs. Consequently, insofar as costs must be charged, direct costs should be defined as "marginal cost" -- i.e., only the additional technical, equipment and labor costs imposed on the DBS operator in making transponder space available for the non-commercial set-aside. This will meet part of the DBS operators' actual cost, without imposing quasi-market prices on non-profit providers.

Direct costs should not include "opportunity costs," "lost business cost" or any other cost that implicitly forces non-commercial programmers to meet commercial cost structures. The Commission should not repeat the experience with leased-access; DBS operators must be required to document direct costs as part of Commission rate-setting, and make such costs part of the record. The Commission should also implement a sliding scale for fees charged to individual programmers, based on programmers' ability to pay. The Commission should require DBS providers to provide equipment, facilities and services to make capacity usable -- otherwise, the reservation will be rendered meaningless.

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[30] Id. at 9-10.

IX. "NATIONAL EDUCATIONAL PROGRAMMING SUPPLIER" IS INCLUSIVE, NOT EXCLUSIVE.

In the view of the Alliance/NATOA, "national educational programming supplier" clearly includes public television stations, all PEG channels, and all educational institutions, public or private, secular or parochial, elementary and secondary, university and collegiate. The Commission should have as expansive a reading as possible of "national educational programming supplier." We believes this opportunity should be available to any programmer or distributor that creates or transports non-profit programming in interstate commerce.

X. CONCLUSION

Alliance/NATOA believes that Section 25 of the 1992 Act gives the Commission a real opportunity to use the electronic mass media as a positive tool for helping our children and our communities. We urge the Commission to take up the challenge and implement the statute in a way that produces real results for DBS subscribers that seek informational and educational programming.

Respectfully Submitted,

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